STATE OF MICHIGAN

COURT OF APPEALS

DEPARTMENT OF TRANSPORTATION,

Plaintiff-Appellee,

v

H. MICHAEL BRENNAN, Successor Trustee of the LILLIAN M. BRENNAN TRUST,

Defendant-Appellee,

and

H & L BRENNAN DISTRIBUTORS, INC.

Intervening Defendant-Appellant.

UNPUBLISHED
September 23, 2008

No. 277851
Washtenaw Circuit Court
LC No. 04-001108-CC

Before: Donofrio, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

In this condemnation action, intervening defendant H & L Brennan Distributors, Inc., (H & L) appeals by leave granted the April 13, 2007, order denying its motion to intervene in, and to dismiss, this action. We affirm, but remand for joinder of appellant as a necessary party, and for further proceedings consistent with this opinion.

H. Michael Brennan is the successor trustee of defendant trust (defendant). Defendant owns three parcels of real property in fee simple identified for purposes of this suit as parcels 53, 54, and 55. Parcel 55 is the subject of this condemnation action. Plaintiff Michigan Department of Transportation (MDOT) sought to condemn parcel 55 for a highway expansion project. H & L is a retail furniture business located on parcel 53 and operated by brothers H. Michael Brennan and Mark Brennan. According to H. Michael Brennan, H & L has leased all three parcels from the trust "pursuant to an oral agreement for well over a decade."[1]

[1] According to H. Michael Brennan, the lease obligates H & L to pay monthly rent, to maintain all three parcels, to pay all property taxes directly to the taxing authority, and to pay all utility (continued…)

As part of a project to improve a section of US-12 running through Saline, Michigan, MDOT entered into discussions with the Brennan brothers regarding the purchase of a strip of parcel 55 that MDOT deemed necessary to carry out and complete the contemplated road improvements. According to MDOT, the Brennan brothers never informed it that H & L was a tenant of any of the three parcels, and H & L does not dispute this assertion.

On April 15, 2004, MDOT's property analyst met with H. Michael Brennan and presented Brennan with a written good faith offer to purchase in the amount of $5,800 in just compensation for the strip of parcel 55, plus $250 for a temporary grading permit. The Brennan brothers rejected the offer. On October 25, 2004, MDOT commenced the present action against defendant pursuant to the Uniform Condemnation Procedure Act [UCPA], MCL 213.51 *et seq.*, requesting an order that defendant surrender the property. At that point, the rights to the property vested in MDOT and litigation ensued regarding just compensation.

Nearly two and a half years later, on February 12, 2007, H & L moved to allow it to intervene in this suit as a matter of right and to dismiss for lack of jurisdiction. H & L asserted that it was entitled to intervene pursuant to MCL 2.209(a) because it was an owner of parcel 55 within the meaning of the UCPA, MCL 213.51(f), as its status as a tenant on parcel 55 gave it a beneficial or possessory interest in the parcel. H & L further asserted that the condemnation action had to be dismissed for lack of jurisdiction because MDOT failed to include H & L in the good faith offer as required by MCL 213.55(1) of the UCPA.

MDOT responded that H & L was not entitled to intervene as a matter of right where the Brennan brothers controlled both the trust and H & L, and the trust could adequately protect the H & L's interests in parcel 55. MDOT characterized the motions as nothing more than gamesmanship and the Brennan brothers' attempt to start the condemnation litigation over. MDOT also maintained that the trial court had jurisdiction to entertain the present action.

The trial court denied both the motion to intervene and the motion to dismiss, finding that H & L's interests were consistent with, and coincided with, defendant's interest. Because the court denied H & L's motion to intervene, it also denied H & L's motion to dismiss for lack of jurisdiction.

H & L argues that the trial court erred by denying its motion to intervene. This Court reviews a decision to deny a motion to intervene for an abuse of discretion. *Vestevich v West Bloomfield Twp*, 245 Mich App 759, 761; 630 NW2d 646 (2001).

A person may intervene in an action by right upon a timely application when a Michigan statute or court rule confers a right to intervene or "when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the person's ability to protect that interest, unless the person's interest is adequately represented by existing parties." MCR 2.209(A)(1) and (3); *Precision Pipe & Supply, Inc v Meram Construction, Inc*, 195 Mich App 153, 155-156; 489 NW2d 166 (1992).

(…continued)

bills associates with services provided to those parcels.

The failure to timely request intervention is a proper ground to deny intervention sought pursuant to MCR 2.209(A). MCR 2.209(A); *Davenport v City of Grosse Pointe Farms Board of Zoning Appeals*, 210 Mich App 400, 408; 534 NW2d 143 (1995); *Dudkin v Civil Service Comm'n*, 127 Mich App 397, 404; 339 NW2d 190 (1983). The parties do not dispute that H. Michael Brennan is the successor trustee of the Trust and the vice president of H & L or that MDOT met with H. Michael Brennan, separately, and the Brennan brothers jointly, while attempting to negotiate a purchase of the strip of parcel 55. H & L represents that it has held an oral lease on parcel 55 for more than a decade, which necessarily preexists MDOT's negotiations with the Brennan brothers and the filing of the present condemnation action. When MDOT commenced this suit on October 25, 2004, H & L had all of the information it needed to immediately seek intervention and dismissal. It did not do so. Rather, it waited until February 12, 2007 -- almost 28 months after the suit was commenced -- to file its motions. It offers no compelling rationale for failing to act in a timely manner. The briefing provided by the parties clearly demonstrates that MDOT's interest in only a strip of parcel 55 was known well before suit was filed and, therefore, any need for clarification of MDOT's complaint to set forth the correct legal description of the strip sought to be condemned does not provide a valid ground to delay a motion to intervene by more than 2 years. Because the motion to intervene was untimely, the trial court did not abuse its discretion in denying intervention under MCR 2.209(A).

Nonetheless, inasmuch as H & L's leasehold and the rights derived from it constitute "property," the taking of which is subject to just compensation, see *infra, p* __, we conclude that H & L shall be joined in the lawsuit under the necessary joinder rule, MCR 2.205(A), because H & L has such "interests in the subject matter of [the] action that [its] presence in the action is essential to permit the court to render complete relief."

H & L also argues that the trial court should have dismissed this action because the court lacked jurisdiction to entertain this condemnation action because MDOT failed to include H & L in its good faith written offer. We disagree.

MCL 213.55 requires a public agency to establish an amount it believes to be just compensation for property it wishes to condemn and to submit to the owner(s) of that property a good-faith written offer to purchase the property for that amount. If, after making such an offer, the agency cannot reach agreement with property owner(s) for the purchase of the property, the agency "may file a complaint for the acquisition of the property" in the circuit court in which the property is located. MCL 213.55(1). Tendering a good-faith offer under MCL 213.55 is a necessary precondition to invoking the jurisdiction of the circuit court in a condemnation action; failure to tender a sufficient good-faith offer deprives the circuit court of subject matter jurisdiction. *In re Acquisition of Land for the Central Industrial Park Project*, 177 Mich App 11, 17; 441 NW2d 27 (1989).

It is well settled that a leasehold and the rights derived from it, constitute "property," the taking of which is subject to compensation. *Lookholder v State Hwy Comm'r*, 354 Mich 28, 35; 91 NW2d 834 (1958); *Dep't of Transportation v Frankenlust Lutheran Congregation*, 269 Mich App 570, 576; 711 NW2d 453 (2006).

Here, H & L asserts that it is a leaseholder pursuant to an oral lease and that MDOT was required to enter into a good-faith negotiation toward acquisition of any of H & L's rights and to

extend a good-faith offer to purchase those rights. Under the unique circumstances presented in this action, however, a jurisdiction challenge cannot be successfully sustained.

The present case may be demonstrated at best, not as a failure of MDOT to engage in good-faith negotiations required by the UCPA, but rather as a failure of the Brennan brothers to act in good faith by disclosing the existence of the purported oral lease, where titles to the parcels identify the trust as the owner of each parcel and the oral lease was not memorialized in any public documents. MDOT acted in good faith on the only known information[2], and the Brennan brothers acted in bad faith by failing to disclose the purported lease. Moreover, MCL 213.55(1) expressly provides that "[i]f there is more than 1 owner of a parcel, the agency may make a single, unitary good faith written offer." Here, H. Michael Brennan serves as both the successor trustee of the trust and the vice-president of H & L. The purported oral lease does nothing more than effectively lease parcel 55 to the Brennan brothers. MDOT negotiated with both brothers and tendered a good faith offer to a principal of both the trust and H & L. Thus, all property owners were provided with the good faith offer to purchase despite the fact that H & L was not specifically named as a party in the proceeding. There is no danger that the UCPA's ultimate purpose of ensuring that property is not taken without just compensation would be violated in this case as all purported owners were aware of the good faith offer.[3] Under these circumstances, we conclude that MDOT complied with MCL 213.55(1), and, thereby, conferred jurisdiction on the trial court to entertain this condemnation action.

We affirm, but remand for joinder of appellant as a necessary party, and for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald

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[2] See MCL 213.55(4)(c) and (e)(i) (complaint must identify "known" owners).

[3] MCL 213.63 allows apportionment of the just compensation for each parcel among the respective parties in interest.